HAMIZAN BIN ABD. HAMID

v.

WONG KOK KEONG & ANOR.

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J.
[SUMMONS NO. 23-119-92]
26 AUGUST 1994

TORT: Road accident - Personal injury claim - Plaintiff not specifically pleading contributory negligence - Elements of contributory negligence shown in evidence of plaintiff - Whether plaintiff's claim must necessarily fail - Whether failure to plead contributory negligence by the plaintiff fatal to plaintiff's case - Consideration of s. 12(1) Civil Law Act 1956 - Whether contributory negligence is a cause of action in itself.

TORT: Road accident - Personal injury claim - Plaintiff suffering serious injuries - Assessment of damages.

The plaintiff rider of a motorcycle was involved in a collision with the car belonging to the second defendant and which was being driven by the first defendant. The plaintiff suffered injuries as a result of the accident and claimed damages from the defendants.

The plaintiff was found to be suffering from the injuries categorised as follows:

(1) cerebral concussion and bleeding into the left side of the cerebrum of the brain;
(2) fracture of the left temporal region of the skull that has healed;
(3) degloving injury of the right side of the chest with permanent scars;
(4) penumohaemothorax - air and blood within the thoracic cavity - due to laceration of the lungs and giving rise to chest pains on deep breathing and coughing;
(5) abdominal injury resulting from retroperitoneal haematoma - healed with no residual effects;
(6) brachial plexus injury of left upper limb with complete loss of power for left shoulder downwards - no sensation in left upper limb - permanent disability.

At the trial one of the issues submitted by the defence was that as the evidence adduced by the plaintiff had shown elements of contributory negligence on the part of the plaintiff, and as the plaintiff had not specifically pleaded contributory negligence in his pleadings, his case must fail.

The question that arose for decision was whether a claimant must plead contributory negligence in order to succeed in the apportionment of damages in the event that contributory negligence is found on his part.

Held:

[1] Section 12(1) of the Civil Law Act 1956 plainly states that the plaintiff's cause of action based on negligence should not be defeated by his own contribution of negligence. The plaintiff's cause of action is always that of negligence and not contributory negligence. Contributory negligence has never ever been a cause of action, but a defence. Therefore to insist that the plaintiff should plead contributory negligence would be tantamount to either, creating a new cause of action or, pleading a defence in the plaintiff's own claim. This would be entirely unacceptable to the present state of the law.

[2] From the authorities it is clear that the issue of contributory negligence must be brought to the Court's consideration before it can be considered. If it is not, then apportionment of liability based on contributory negligence of the claimant cannot succeed. In the present case, there is no necessity for the plaintiff to plead contributory negligence in order to succeed in his claim for negligence though, he may have contributed to it. The defence of contributory negligence has in fact been pleaded in the statement of defence and as such, it is an issue for the Court's consideration.

[3] Taking into account the evidence led as to how the accident occurred, the defendants were 90% responsible for the accident while the plaintiff was contributorily liable, to the extent of 10%, towards the cause of the accident.

[4] As for the injuries, the plaintiff, based upon 100% liability, is awarded RM18,000 as general damages for the injuries in category (1) which sum is to include the injuries for category (2) as they are somewhat related and in the same region. For categories (3),(4) and (5) the plaintiff is awarded a sum of RM12,000 as general damages and for category (6) a sum of RM50,000.

[5] For loss of future earnings, the multiplicand was agreed at RM200 per month and the number of years purchase had to be 16 years, in accordance with the statutory formula, as the plaintiff was below the age of 30 at the time of the accident.

[Plaintiff's claim allowed with interest and costs].

Cases referred to:
Lee Ewe Teik v. Ariffin bin Hussain [1990] 2 CLJ 191 ***(cons)***
Ch'ng Chong Shong v. Lok Chan Chong & Anor. [1991] 1 CLJ 515 ***(cons)***
Rosita bte Baharom (an infant) v. Sabedin b. Salleh [1993] 2 CLJ 300 / [1993] 1 MLJ 393 ***(dist)***
Fookes v. Slayton [1978] 1 WLR 1293 ***(foll)***
Anuar bin Mat Amin v. Abdullah bin Mohd Zain [1989] 3 MLJ 313 ***(refd)***
Menah bte Sulong v. Lim Soo & Anor. [1983] 1 CLJ 26 ***(cons)***
Drinkwater v. Kimber [1952] 2 QB 281 ***(refd)***
Poh Sun Hong v. Lim Peng Chia [1979] 1 MLJ xxxviii ***(refd)***
Murtadza bin Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 12(1), 28A(2)(c)(1)
Law Reform (Contributory Negligence) Act 1945, s. 1(1) (UK)

For the plaintiff - C. Kandiah; M/s. Kandiah Chelliah & Partners
For the defendants - R.K. Nathan (Charles Nicholson with him); M/s. R.K. Nathan & Co.

JUDGMENT

James Foong J:
The plaintiff's claim against the defendants is for damages suffered by him as a result of a motor accident. The plaintiff alleged that on 10 May 1992 at about 2 a.m., he was riding his motorcycle bearing registration No. ABA 9959 along the Federal Highway from the direction of Kuala Lumpur towards Kelang. He exited from his motorcycle lane onto the bridge leading to the flyover which crosses over to Sungei Way town. At the top of this bridge which accommodated 3 traffic lanes was a traffic light which at that material time indicated red. The plaintiff then proceeded towards the farthest most traffic lane with the intention of making a U-turn after the traffic light. While he was on the farthest most lane, the 2nd defendant's car driven by the 1st defendant cut into his path thereby causing him to collide into the far right side of the defendants' car. The impact of this collision flung the plaintiff forward sending him crashing into the rear windscreen of a front car. Due to this accident, the plaintiff sustained severe injuries which I shall refer to later.

The defendants were absent throughout the trial but, their Counsel were present and participated in cross-examination and submissions.

One of the issues submitted by the defence is that from the evidence adduced by the plaintiff there are elements of contributory negligence on the part of the plaintiff and, as the plaintiff has not specifically pleaded contributory negligence in his pleadings, his case must fail. To support this contention, Mr. R.K. Nathan leading Counsel for the defendants submitted the following authorities; *Lee Ewe Teik v. Ariffin bin Hussain* [1990] 2 CLJ 191, *Ch'ng Chong Shong v. Lok Chan Chong & Anor.* [1991] 1 CLJ 515 and *Rosita bte Baharom (an infant) v. Sabedin b. Salleh* [1993] 1 MLJ 393.

Apparently, of late, it has become fashionable for the defence to allege that a failure to plead contributory negligence by the plaintiff is fatal to the plaintiff's case in the event the plaintiff is found to have contributed to the negligence himself. In short, if this principle is accepted, it would change the law of negligence where contributory negligence, once a defence has now become a cause of action.

Before the existence of the English Law Reform (Contributory Negligence) Act 1945, s. 1(1) of which is *pari materia* to s. 12(1) of our Civil Law Act 1956, common law provided a complete defence if contributory negligence was proved against the claimant. However, with the coming into force of the said Acts, such a claim is no longer defeated except the claimant's damages will be reduced proportionately to his share of the liability.

Though the common law position is somewhat altered, the principle of contributory negligence as a defence does not seem to have changed. It is still required to be pleaded by the defendant and, failure to do so is fatal to the defence even though, contributory negligence on the part of the plaintiff is found to exist. The decision of *Fookes v. Slayton* [1978] 1 WLR 1293 supports this principle. In this case, the English Court of Appeal held that the trial Judge had erred in awarding damages based on contributory negligence of the claimant when, the defendant did not even file his defence or appear in Court. The award was reversed by the Court of Appeal and altered to a 100% liability against the defendant.

Fookes v. Slayton has been accepted in our Courts for sometime and, in fact it was reiterated by Mr. Justice K.C. Vohrah in the case of *Anuar bin Mat Amin v. Abdullah bin Mohd Zain* [1989] 3 MLJ 313.

However, what gives the impression to the defence that the claimant must plead contributory negligence in order to succeed in the apportionment of damages in the event that, contributory negligence is found on his part is the case of *Lee Ewe Teik* where, Mr. Justice Edgar Joseph J. (as he then was) stated as follows:

> In the light of these findings, and the failure of the plaintiff to **plead** or argue contributory negligence, I was of the view that although my human sympathies were with the plaintiff rider I was not at liberty to indulge them. (The emphasis is mine)

To support his view, the learned Judge relied on the Federal Court decision of *Menah bte Sulong v. Lim Soo & Anor.* [1983] 1 CLJ 26, where Chief Justice H.T. Ong asserted as follows:

> The statement of claim alleged against the defendant driver total negligence - it was either that or nothing. That the Judge was not invited to consider the question of contributory negligence at all may be clearly seen in the argument of Counsel at the trial. The grounds of appeal now before this Court likewise eschews that issue altogether.

Not long after *Lee Ewe Teik's* case, Mr. Justice Dzaiddin J. (as he then was), in the case of *Ch'ng Chong Shong* seemed to take the view that contributory negligence needs to be pleaded by the plaintiff when he expressed as follows:

> In the present case, the plaintiff had not only failed to plead contributory negligence, but did not even bring up the issue during the trial. In fact, there was no suggestion made to the defendant, under cross-examination, that he was in anyway guilty of contributory negligence.

From the aforesaid authorities, one element is certain and that is, the issue of contributory negligence must be brought to the Court's consideration before it can be considered. If it is not, then apportionment of liability based on contributory negligence of the claimant cannot succeed. In vast majority of cases where the cause of action is based on negligence, the defence normally plead contributory negligence in their statement of defence. Once this is pleaded, it becomes an issue before the Court which requires the Court's consideration. As it has become an issue, there is no necessity for the plaintiff to plead the same. However, if the defendant does not plead contributory negligence in their defence, it does not become an issue before the Court. In such an event, if the plaintiff is able to prove any degree of negligence against the defendant he will succeed in his case despite the fact that, he may have contributed towards it. He will be entitled

to damages based on a 100% liability. The cases of *Fookes v. Slayton* and *Anuar bin Mat Amin v. Abdullah bin Mohd Zain* support this principle. On the other hand, if the plaintiff fails to prove any degree of negligence on the part of the defendant, he will fail completely in obtaining any damages from the defendant. This is exactly the situation in both *Lee Ewe Teik* and *Menah bte Sulong*.

In *Lee Ewe Teik's* case, the plaintiff claimed damages against the defendant as a result of a motor accident which he alleged occurred on the same side of the road as the defendant. The learned Judge rejected the plaintiff's version completely and found that the plaintiff was actually travelling from the opposite direction and, while attempting to overtake a vehicle which was in front of him, collided into the defendant who was travelling from the opposite direction. In this case, there is no question of contributory negligence as the learned Judge found that the plaintiff has not proved negligence on the part of the defendant at all. There is therefore no question of contributory negligence.

Similarly, in *Menah bte Sulong* there was no necessity to consider contributory negligence when the appellate Court rejected the plaintiff's version of how the accident took place completely.

In *Ch'ng Chong Shong's* case, the facts are entirely different. Here, the plaintiff was entirely at fault in bringing the action against the defendant. It was a third party, who was not a party to the action whom the Judge found to be entirely to be blamed for the negligence. In short, the plaintiff sued the wrong person. By stating that the plaintiff should have pleaded contributory negligence, the learned Judge must have meant that the plaintiff should have brought an action against the third party as the main defendant and, at the same time claimed that the present defendant had also contributed to the negligence.

Section 12(1) of the Civil Law Act never provides contributory negligence to be a cause of action. In fact it plainly states that the plaintiff's cause of action based on negligence should not be defeated by his own contribution of negligence. As plainly stated by Singleton LJ in *Drinkwater v. Kimber* [1952] 2 QB 281, s. 1(1) of the English Law Reform (Contributory Negligence) Act 1945, (which is *pari materia* to our s. 12(1) of the Civil Law Act) "does not create a right of action, it removes an obstacle." The plaintiff's cause of action is always that of negligence and not contributory negligence. Contributory negligence has never ever been a cause of action but a defence. Therefore, to insist that the plaintiff should plead contributory negligence would tantamount to either, creating a new cause of action or, pleading a defence in the plaintiff's own claim. Certainly, this would be entirely unacceptable to the present state of the law.

I shall now turn to *Rosita's* case which is a recent Supreme Court decision. The plaintiff in that case appealed against the decision of the trial Judge for dismissing her claim and, not allowing any award for contributory negligence of the defendant. In the course of dismissing the plaintiff's claim, the trial Judge also rejected the plaintiff's statement of claim made after the close of the case for the defence. The Supreme Court upheld the trial Judge's decision mainly on the ground that, the plaintiff's proposed further reamendment to the statement of claim at such a late stage would, have surprised and prejudiced the defendant. The issue of whether contributory negligence must be pleaded by the plaintiff or otherwise be fatal to his claim was not the *ratio decidendi* of the case. As such this case cannot be considered as authority for this issue.

Now back to the case at hand, I find that there is no necessity for the plaintiff to plead contributory negligence in order to succeed in his claim for negligence though, he may have contributed to it. The defence of contributory negligence has in fact been pleaded in the statement of defence and as such, it is an issue for this Court's consideration. From the facts of this case, I find that the plaintiff has contributed 10% by his contributory negligence towards the cause of the accident while, the defendants are 90% responsible. This is based on the following grounds.

The plaintiff was travelling along the correct path towards the traffic light. He did not see the defendants' vehicle when he came out of the motorcycle lane onto the bridge leading to the flyover. When he was already on the farthest right lane of the bridge, the defendants' car approached and he knocked into it.

If the defendants' car had not cut into into the path of the plaintiff then, it must have been stationary on one of the three lanes awaiting the traffic lights to change. Alternatively, if it was in motion and not cutting into the lane of the plaintiff, then it must be within one of the three traffic lanes. In both these situations, for the collision to occur, the plaintiff must have ridden his motorcycle and collided into the defendants car. But why should he do this for there is evidence that he was proceeding towards the right. When he is proceeding towards this direction there can be no damage to any vehicle on its leftside like those incurred on the defendants' car. Even though the plaintiff may be weaving in and out of cars queing up at the traffic lights, there can still be no damage to vehicles on their right side if the defendants was negligent in knocking into one of them especially, on the far end of the right side of the car. This is for the reason that the plaintiff was proceeding towards the right. Without any evidence to the contrary, I find that it was the defendants' car that cut into the path of the plaintiff thereby, causing him to collide into the far end of the right side of the defendants' car.

In respect of the 10% contributory negligence on the part of the part of the plaintiff, I consider it to be attributed to the speed he was travelling which was 30 km per hour at the material time. There is no necessity to travel at this high speed especially at a traffic junction. If he was slower, evasive action could have been contemplated and taken to avoid the accident.

The defendants' Counsel did attempt to submit that the plaintiff in evidence never stated that he collided into the defendants' car. I dismiss this contention for it was admitted in the statement of defence that a collision did take place between the plaintiff's motorcycle and the defendants' car on the day in question. Once, such matter is admitted, the defendants cannot be permitted to deny otherwise.

I shall now proceed with the assessment of damages. The plaintiff was admitted to the hospital for treatment immediately after the accident. According to his evidence he was there for two months. As for his injuries, he has set it out in his statement of claim as follows:

(a) Tangan kiri terlumpuh
(b) Kecederaan pada kepala
(c) Kecederaan pada mata
(d) Kecederaan pada bahagian dada
(e) Kecederaan pada perut.

Unfortunately, further details of such injuries are not stated in the statement of claim nor was, a usual medical report from the hospital which treated him, tendered in evidence. The only evidence in respect of his injuries came from PW2, the orthopaedic surgeon who examined him recently on 16 May 1994. From PW2, the injuries of the plaintiff seem to be as follows:

(1) cerebral concussion and bleeding into the left side of the cerebrum of the brain. There is now permanent residual effects of the brain injury in the form of weakness and spasticity of his lower limbs especially his left lower limb;
(2) fracture of the left temporal region of the skull that has healed;
(3) degloving injury of the right side of his chest with permanent scars on his chest;
(4) penumohaemothorax - air and blood within the thoracic cavity, out of the lungs; this is due to laceration of the lungs which gives rise to chest pain on deep breathing and coughing;
(5) abdominal injury resulted from retroperitoneal haematoma; this has healed with no residue effects;
(6) brachial plexus injury of his left upper limb with complete loss of power for left shoulder downwards; there is no sensation in the left upper limb and this is a permanent disability.

For the left upper limb, PW2 recommended amputation of this limb to be replaced by an electronic artificial upper limb for usefulness. This would cost RM18,000 to RM22,000. For the first category of injuries, the plaintiff's Counsel submitted a sum of RM18,000 based on the Singapore case of *Poh Sun Hong v. Lim Peng Chia* [1979] 1 MLJ xxxviii. My own research shows that in the Malaysian case of *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216, a sum of RM20,000 was awarded. As I find that the residual injuries of the plaintiff is not

as serious as the above two cases, I award a sum of RM18,000 as general damages for the category of injuries to include also those injuries in the second category as, they are somewhat related and in the same region.

For the third category which I shall tie up with the fourth and fifth, I award a sum of RM12,000 as general damages.

For the sixth category, I award a sum of RM50,000 as general damages which is close to what both parties have submitted. As there is no claim for the electronic artificial limb under the special damages nor, is there any evidence that the upper left limb of the plaintiff will be amputated and replaced by an artificial limb, I will not make any award for this item.

As for the injury to the eye, though pleaded, no evidence was adduced at trial on it. I therefore make no award for this.

For loss of future earnings, the parties seem to have agreed on a sum of RM200 per month. The defendants' Counsel submitted that it should be based on 5 years purchase while, the plaintiff's Counsel urged me to base it on 16 years. Under s. 28A(2)(c)(1) of the Civil Law Act, I find no reason to accept the defendants' Counsel's contention. As the plaintiff is below the age of 30 years, the loss should be based on 16 years. I therefore award an sum of RM38,000 for loss of future earnings.

The total general damages would now amount to RM118,400. As for special damages, it was agreed at RM1,515.

As there is contributory negligence of 10% on the part of the plaintiff, general damages would be reduced to RM106,560 and special damages to RM1,364.

For interest I allow;

(a) 8% per annum on RM72,000 (less a sum awarded for loss of future earnings) from date of extraction of writ of summons till date of judgment;
(b) 4% per annum on RM1,364 from date of accident till date of judgment;
(c) 8% per annum interest on the RM107,924 from judgment to date of realisation.

I also award costs to the plaintiff.